# Parentage by Intention for Same-Sex Partners

**Diana Richmond**
*Sideman & Bancroft LLP (San Francisco)*

The California Supreme Court accepted for review three cases that gave it the opportunity to affirm or substantially revise the tests for determining parenthood. Although all three cases arose from the breakup of same-sex couples, they presented issues that could well apply to a far wider variety of parentage questions. This article explores different modes of determining parentage and advances the premise that the court's previously enunciated test of determining parenthood in assisted reproductive technology cases—the parties' intention at conception—is the most preferable. The Supreme Court decided the three cases after this article was written but prior to publication. The decisions are discussed in the afterword to this article. ■

California courts historically have made it difficult, if not impossible, for two persons of the same sex to be declared parents of a child. They have ruled that a lesbian partner who was not a biological parent and had not adopted is not an "interested person" who could bring an action under the Uniform Parentage Act (UPA).[1] They have ruled that a person who is not a biological parent of a child has no standing to assert parentage under the UPA.[2] Moreover, they have rejected attempts to create parentage by estoppel[3] and, until recently, have made it difficult to obtain second-parent adoptions. They have refused to extend the juvenile court's doctrine of de facto parentage to same-sex parentage cases.[4] This historical context is rapidly changing with a 2003 California Supreme Court decision upholding second-parent adoptions for same-sex couples[5] and with the enactment of the California Domestic Partner Rights and Responsibilities Act (DPA), which became effective January l, 2005.[6] While these two developments are major protections for same-sex families now and in the future, they do not provide a mechanism for determining the parents of children born to couples who were not registered as domestic partners or did not adopt. This article is premised on the notion that it should be easy for same-sex couples to determine parentage and that their intentions as articulated at the outset should decide the question.

On September l, 2004, the California Supreme Court accepted for review three parentage cases that are likely to reduce the existing hurdles to establishing same-sex parentage.[7] Some of the parties to these cases urge the Supreme Court to equally apply the presumptions of fatherhood contained in the UPA to women seeking co-parenthood. These parties also urge the court to abandon its prior finding that a child may have only one mother under the UPA.[8] Some urge that the Supreme Court resolve the question by use of the child's best interest or the child's constitutional right to the care and companionship of someone he or she has come to regard as a parent. Some assert that every child should have two parents. Some urge that the parentage question be resolved by use of the court's previously enunciated test, the intention of the parties at the time of conception. In the view of the author, who represents one of the parties in the pending cases, the law should be interpreted to make it easier for same-sex couples to establish co-parentage, if that is their intention; however, co-parentage should not be involuntarily imposed upon a natural mother or father if that was not the parties' mutual

intention from the outset. Whatever standards the court adopts should be capable of clear and consistent application, establish parentage as early as possible, and not permit parentage to change over time as relationships between parents change. Such standards should likewise create the same rights and obligations for same-sex couples as for opposite-sex couples. The author believes the intention test originally articulated by the California Supreme Court in *Johnson v. Calvert* in 1993[9] best accomplishes these objectives.

## THE *JOHNSON v. CALVERT* DECISION

In *Johnson v. Calvert,* the California Supreme Court articulated a new test for parentage: "[I]ntentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[10] The case arose from an opposite-sex surrogacy contract that forced the court to make a choice between two competing mothers. Advances in medical technology have enabled people to become parents under circumstances that previously could not be imagined, and the state high court's approach to these developments was to fashion a test that adhered both to the parties' intentions and to the dictates of the UPA. This case provides the starting point for the analysis that follows.

In *Johnson,* a wife who was infertile and her husband entered into a contract with a second woman, who agreed to act as a surrogate for the couple, bear them a child, and relinquish any claims to parentage.[11] The contract specified that the husband and wife would be recognized as the child's parents.[12] After having an embryo from the husband's sperm and the wife's egg implanted in her uterus, the surrogate carried the child to term.[13] Because the relationship between the couple and the surrogate had deteriorated during the pregnancy, the surrogate had second thoughts and filed a parentage action, claiming that she was the mother because she had borne the child.[14] The court stated that the UPA applied, but that, since the act recognized only one mother, the court had to decide between the gestational mother and the biological mother.[15] The court looked to the parties' intentions as expressed in the surrogacy contract to resolve the question in favor of the wife.[16]

In *Johnson* the court made several other rulings. It stated that the presumptions of parentage under the UPA do not come into play where the parties' intentions are known.[17] Because a presumption is intended to aid in the determination of a fact when the circumstances are not known, the presumption is unneeded when the circumstances are known.[18] The court also stated that intentions rule over biology; an ovum donor is not a parent without the requisite intent, any more than a woman who bears the child from an ovum of another is a parent without the requisite intent.[19] In addition, the court explicitly rejected adoption of a best-interest test to determine parentage: "[S]uch an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody."[20]

## THREE CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

All three cases pending before the California Supreme Court involve disputes between female same-sex former partners; no men are seeking parentage rulings in these cases. The court once again is called upon to interpret the UPA in situations not originally contemplated by the framers of the act. The questions raised include whether intention controls over the UPA's presumptions, whether a child can have two mothers under the UPA when there are no competing fathers, whether the presumptions under the UPA that refer to men should be construed to include women, and whether the cases should be decided from the standpoint of the child's best interest or constitutional rights instead of the intentions or rights of the adults involved.

### *KRISTINE RENEE H. v. LISA ANN R.*

In this case[21] a same-sex couple decided to have and rear a child together.[22] Kristine was inseminated

informally with a friend's sperm and became pregnant.[23] In the eighth month of her pregnancy, she and Lisa decided to seek court approval of their decision to become parents together.[24] Both partners signed a stipulation that they intended to be parents of the child about to be born and that they both undertook the rights and responsibilities of parenthood.[25] Kristine filed a parentage action in court and presented the stipulation to a family court judge, who entered a judgment that both women were parents of the child.[26] The child's surname was a combination of the surnames of Kristine and Lisa, and Lisa was named as father on the child's birth certificate.[27] Lisa listed the child as a dependent on her health insurance, and both Kristine and Lisa provided financial support for the child.[28] Both women participated as parents for nearly two years.[29]

When the women broke up, Kristine challenged the judgment as exceeding the power of the court.[30] But the trial court upheld the earlier judgment, finding both women to be parents.[31] The Court of Appeal reversed, finding that the stipulated judgment exceeded the court's power; however, it stated that on retrial the court could use both the presumption arising from taking the child into one's household and holding the child out as one's own and the intention test as criteria for determining parentage.[32] The Court of Appeal held that the presumption should be applied equally to a woman as to a man.[33]

### *K.M. v. E.G.*

E.G. had been trying to have a child as a single parent before meeting K.M.[34] After K.M. and E.G. started to live together, E.G. continued trying for more than a year to become pregnant by artificial insemination.[35] She then tried to become pregnant by in vitro fertilization using her own eggs and a stranger's sperm.[36] When she found she was no longer producing viable eggs, she accepted an ovum donation from K.M. on condition that E.G. would be the sole parent.[37] E.G. told K.M. that their relationship was too new and that she would consider an adoption only after the child was 5 years old if the parties were then still together.[38] Before they began the ovum donation procedure, the parties received counseling about the procedure.[39] E.G. agreed to accept all rights and responsibilities of parenthood by signing an ovum-recipient consent form.[40] K.M. signed the ovum-donor consent form at the hospital, a month before the egg retrieval procedure.[41]

K.M.'s eggs were fertilized with sperm from an anonymous donor; then four of the resulting embryos were implanted in E.G.'s uterus.[42] Twins were born and were given E.G.'s surname.[43] Only E.G. was listed on the birth and baptismal certificates.[44] The parties promised each other to tell no one of the twins' genetic connection to K.M.[45] E.G. and K.M. lived together and shared caretaking duties for the children, although only E.G. undertook financial responsibility for them.[46] Initially, only E.G. maintained life and medical insurance for the twins.[47] After two years, the parties began to argue about E.G.'s unwillingness to allow K.M. to adopt the twins.[48] When the children were 5 years old, K.M. brought a parentage action seeking to be determined a parent over E.G.'s continuing objection.[49] The trial court found by clear and convincing evidence that K.M. had "knowingly, voluntarily and intelligently" relinquished all claims to parenthood when she signed the consent form for ovum donation.[50] Both the trial court and Court of Appeal ruled against K.M. on the ground that the parties' intentions were that E.G. would parent the children and that K.M. had knowingly, intelligently, and voluntarily waived all claims to parentage when she made the ovum donation.[51] And both courts held that the presumption of parenthood that applies when a man holds a child out as his own, as extended to the mother-and-child relationship by California Family Code section 7650,[52] was inapplicable, because the parties' actual intentions were already known and because the presumption did not arise where K.M. did not hold herself out as the parent.[53]

### *ELISA MARIA B. v. SUPERIOR COURT*

In *Elisa Maria B.*,[54] Elisa and Emily each decided to give birth to a child, using the same anonymous sperm

donor so that their children would be related.[55] Elisa gave birth to a son, and Emily gave birth to twins a year later.[56] All three children were given a hyphenated surname combining Emily's and Elisa's surnames.[57] The two women breastfed their three children interchangeably.[58] Elisa considered both Emily and herself mothers of the three children.[59] Emily did not return to work after the twins were born.[60] Elisa provided financial support for the entire family, listed all three children as dependents on her medical insurance, and claimed all three as her dependents for income tax purposes.[61] The parties separated a year after the birth of the twins and two years after the birth of the first child.[62] For a time Elisa continued to provide financial support for the twins, but when she stopped paying,[63] Emily went on public assistance and the county sought child support from Elisa.[64] The trial court granted child support, but the Court of Appeal reversed on the ground that, because Elisa was not the children's father under the UPA and did not give birth to the twins or adopt them, she could not be their parent under the UPA.[65]

## CRITERIA FOR DETERMINING PARENTAGE

If there were no law on how to determine parentage, the court could choose from a number of criteria, such as biology, the relationship between the adults, the relationship between the child and the adults, or intention. Biology is certainly among the earliest of such organizing principles and still has a role to play in existing law:

- Under the UPA, motherhood is established by giving birth.[66]
- There is a blood-test exception to the conclusive presumption of parentage for a child born to a married couple.[67]
- A sperm donor who donates informally, without using a physician, is the natural father under the UPA.[68]

Biology, however, does not adequately resolve the question of parentage in assisted reproductive technology cases. It would not be logical for a sperm or egg donor who does not intend to become a parent to become one solely because of his or her genetic connection. For example, in *Kristine Renee H. v. Lisa Ann R.,*[69] application of a biological test would render the informal sperm donor the child's father and Lisa a legal stranger to the child—a result entirely contrary to the parties' intentions but not without precedent in prior case law. Nor does biology resolve the question of who is the mother in surrogacy cases. And use of biology alone would preclude at least one member of most same-sex couples from being determined a parent.

### RELATIONSHIP BETWEEN ADULTS AS CRITERION

Likewise, the relationship between adults is used in some circumstances based on (1) the conclusive presumption of parentage for a child born during marriage;[70] (2) the presumption of parentage arising from attempting to marry the mother;[71] and (3) the rights of registered domestic partners with respect to a child of either of them.[72] Formalizing the relationship, by marriage or registration of a domestic partnership, is a logical, consistent way of assigning parentage. The formalizing of the relationship is a reliable measurement of the couple's conscious commitment to each other and to the responsibilities of parenting together.

But using the parties' relationship to determine parentage in the absence of such formalization is likely to lead to confusion and inconsistent results. In such an instance how does a court gauge the requisite level of commitment in the relationship in order to assign parentage to both members of the couple? Suppose a woman (it does not matter in this analysis whether she is homosexual or heterosexual) is impregnated by an anonymous sperm donor and then lives with an intimate partner for the first three years of the child's life. Assume further that the partner then leaves and the mother begins a relationship with another person with whom she registers as domestic partners or marries. That partner helps co-parent the child for the next five years

of the child's life. Is either partner a second parent to the child? If so, which of them, and why? What if the mother seeks to hold the first partner as parent over the objection of that partner? Is that fair from the perspective of any of the participants, including the child? The relationship between the parties does not resolve the question of parentage in any of the three pending cases, inasmuch as none of the couples had either married or registered as domestic partners with the Secretary of State.[73]

### RELATIONSHIP BETWEEN CHILD AND ADULTS: UPA PRESUMPTION AND BEST INTEREST

Examining the relationship between the child and the adults in his or her life to determine "parentage" options is primarily used in juvenile dependency cases, where one or both of the child's natural parents have abandoned or abused the child and the court must choose a parent figure among the best available choices. In this context, the California Supreme Court ruled that a man who was not biologically related to a child but who had served in a parental role in the child's life could be established as the child's parent where the child otherwise would be orphaned.[74] In a similar context, the Court of Appeal ruled that the UPA presumption arising from a father's taking a child into his household and holding out the child as his own applied equally to a woman.[75] The relationship between the child and the adults is the underpinning for the statutory presumption of parentage arising from a father's taking a child into his household and holding the child out as his own.[76] It is also the underpinning for use of the best-interest test.

The UPA presumption at stake in these cases is inherently ambiguous and, for that reason alone, not helpful in determining parentage. The first clause of the presumption, a man "receives the child into his home,"[77] connotes an archaic model of a man who has primacy in the household and takes in a child he has fathered. The clause is more difficult to apply when a couple of either sex or either sexual orientation lives together and one of them has a child. Because the other member of the couple already lives in the household, it cannot be said that the other "receives the child into his [or her] home" because both members of the household already live there.[78] The fact of the child's entering the household is thus equivocal: it does not necessarily indicate parentage. Given that a presumption is intended to substitute for evidence where it would assist in resolving a factual question, this first clause of the UPA presumption is virtually useless without the second clause, "and openly holds out the child as his [or her] natural child."[79] Amici in the three pending cases urge that the presumption be applied to women as well as to men, just as it was by the Court of Appeal in *In re Karen C.*[80] If the presumption is to be used, it should be applied equally to women and men so that lesbians are not excluded from a means of determining parentage that is available to others. It logically follows that other related statutes should be applied equally to women and men. For example, if a man donates sperm to someone other than his wife through the services of a physician, he is a legal stranger to a child conceived from that sperm.[81] It follows that an ovum donor should likewise be treated as a legal stranger under the law. Similarly, a man and a woman can obtain a judgment establishing parentage based on their filing a written stipulation;[82] so, too, should a same-sex couple like Kristine Renee H. and Lisa Ann R. have the same right.

Use of the presumption or best-interest test would work well in the pending case of Elisa B. and Emily B.[83] The two women gave birth to children born of the same anonymous sperm donor, rendering their children biological half-siblings.[84] The two women held themselves out as the parents of each other's children and each contributed to the children's support while they were living together.[85] One can assume that their children were attached to each other and to both women. The children and one of the women were dependent on the financial support of the other woman, without which they became dependent on the state for support.[86] It is not difficult to determine that both women are parents by using either the presumption or the best-interest test because the facts so

clearly support such a finding. But with Kristine H. and Lisa R.,[87] the presumption arising from taking a child into one's household and holding the child out as one's own is less clear than the parties' own explicit enunciation of their intention in the stipulated judgment of joint parentage. Under the reasoning of *Johnson v. Calvert,*[88] the presumption is unnecessary because the facts are known.

Use of either of these tests with K.M. and E.G.[89] is far more problematic. The Court of Appeal found the presumption factually inapplicable because the children were born into a household in which both parties resided; there was no "receiving" of the child "as one's own" but, rather, a "welcoming" of E.G.'s child.[90] Further, K.M. never held herself out as the children's biological mother, consistent with the parties' explicit agreement that her genetic connection would be kept confidential.[91] And because both women, as in *Johnson,* qualified to be the natural mother—one giving birth, the other genetically related—there was no need to apply an evidentiary presumption because, in such a case, "the ultimate determination of legal parentage is made by examining the parties' intentions."[92] Here K.M. had relinquished all claims to parentage when she agreed to become an ovum donor and signed an agreement waiving her rights, while E.G. "intended to bring about the birth of the child to raise as her own."[93] However, both the trial court and Court of Appeal struggled with the question of the children's best interest because they found that the best interest of the children conflicted with the rights of E.G. and the parties' clearly expressed intentions.[94] Because *Johnson* made clear that intention, and not best interest, was the test, the courts ruled in favor of E.G. as the sole parent.[95]

### DISADVANTAGES OF BEST-INTEREST TEST

A more generalized use of the best-interest test faces several challenges and obstacles. In *K.M. v. E.G.,* both the trial and appellate courts noted the unfairness of invoking best interest either to force co-parentage on a person who had undertaken to become a sole parent or to force parentage upon an unwilling cohabitant who had helped care for a child.[96]

One obstacle is the collision of a parent's fundamental right to make decisions about his or her own child[97] with a child's fundamental right to the care and companionship of a parent. The United States Supreme Court, signaling its deference for those parental rights, has ruled that a court may not intrude upon a parent's constitutional rights by imposing grandparent visitation on the parent over his or her objection.[98] In each of the three cases discussed in this article, there is one person who is irrefutably a parent of the child and who certainly holds these fundamental constitutional rights. Will the California Supreme Court rule that a child's constitutional right to the care and company of a parentlike figure overrides the acknowledged parent's constitutional rights? If so, the case could be appealed to the U.S. Supreme Court for resolution. However, there is a doctrine that courts will not reach constitutional questions when a decision can be made on some other legal basis,[99] and in each of the three cases the appellate courts have found other bases on which to make the decision. Therefore, it is unlikely that the California Supreme Court will invoke such conflicting constitutional rights when a decision can otherwise be made under existing law.

Another challenge to the application of either of these tests is the question of how many parents a child can have. It may be that more than one person takes the child into his or her household and holds out the child as his or her own, either simultaneously or sequentially. Will the courts require a child to have two parents if any way can be found to do so? How should the courts determine parentage if two or more persons have served sequentially in a caretaking role for the child? Some argue that the courts should do so on the ground that a child's interest is served by having two parents. Why not three or four? An argument can certainly be made that a child is better served by having more than one or two caretakers. If so, how should the court resolve the question of who is and is not a parent? These

issues will be invoked sooner rather than later if the court adopts a best-interest test.

The above questions expose the infirmities of using best interest as the test for parentage. Eschewed by the California Supreme Court as unwonted governmental interference in matters of fundamental privacy,[100] the best-interest test imposes a stranger's judgment upon that of a parent. While the flexibility and malleability of the best-interest test may well suit custody decisions, which can change over time for good reasons, these very features make it a poor test for determining parentage, which should be determined once and for all, as early as possible in a child's life. The best-interest test, over the past hundred years, has resulted in shifting and inconsistent decisions based (at different times and places and depending on the particular judge's worldview) on notions of reverence for motherhood; presumptions of paternal custody for boys; parental attachment theory; presumptions of sole or joint custody; the "conventional, middle class, middlewest background of the parents";[101] and presumptions against lesbian parents.[102] The best-interest test poses inherently vague criteria for the evaluator or the judge deciding the matter: there are gradations and shifts in attachment and connectedness, in weighing a child's temporary pain after a separation versus losing a caretaker and permanent emotional damage.[103]

In light of this history, it is curious that amici for lesbian and gay organizations in the three pending cases urge the court to adopt a best-interest test. To this author such a test appears to render the parties vulnerable to some of the same judicial biases that have precluded same-sex couples from becoming parents in the past. The positions of many of the amici are that children should have two parents, a bias that may or may not best serve the children and one that reflects cultural values that shift.

Intention is the underlying rationale for many modes of becoming a parent. It is the foundation for all adoption statutes, including adoption of a domestic partner's child and second-parent adoption.[104] In the *Sharon S.* second-parent adoption case, the Supreme Court observed: "The proceeding [adoption] is essentially one of contract between the parties whose consent is required."[105] Intention underlies the statutory provision that a man can become a father based upon a declaration of parentage upon birth.[106] Intention is the foundation for parentage of children born by means of artificial insemination under a physician's supervision.[107] Likewise, intention underlies the California Court of Appeal's 2000 decision upholding a contract between an unmarried man and woman who agreed that he would be the father of a child conceived with the sperm of another donor.[108] Even the presumption arising from receiving a child into one's home and holding the child out as one's natural child is essentially premised on intention.[109]

Janet Dolgin, an expert in the legal aspects of assisted reproductive technology, notes that "a central component of the traditional ideology of family—that family relationships stem from and reflect biogenetic unity—has been widely supplanted by understandings of family grounded in notions of choice."[110] She further comments that the law today recognizes "[a] set of contrasting assumptions that ground parentage in conscious, deliberate decisions and agreements, i.e., in intentions and in contracts," appearing alongside "traditional assumptions about parentage that ground the parent-child relationship firmly on biological truths."[111]

Intention has been employed by several courts in determining parentage in assisted reproductive technology cases. For example, biology was explicitly rejected in favor of intent in a case where a child was born from a surrogacy contract in which an embryo formed with sperm and ova from unrelated parties was implanted in a surrogate, who gave birth by contract to provide parentage to a married couple.[112] The court in that case declined to limit *Johnson* to its facts, citing the Supreme Court's "broader purpose" to emphasize the "intelligence and utility of a rule that looks to intentions."[113]

At least two decisions in New York have used the intention test to determine parentage in assisted reproductive technology cases. One appellate court used the egg donation analysis from *Johnson* to find

that a gestational mother, who, with the consent of her husband, had been implanted with embryos formed from his sperm and anonymously donated eggs, was the intended mother of the twins who were born.[114] The husband's arguments that the children should be declared illegitimate or that he should be declared the sole parent were defeated by application of his wife's intention to be a parent at the time of the in vitro fertilization.[115] Similarly, another New York case enforced an in vitro fertilization consent agreement providing that frozen embryos would be donated to the in vitro fertilization program for research if the parties were unable to make a decision about them.[116] Denying the request of a wife in a marital dissolution proceeding for custody of the frozen embryos so that she could bear another child, the New York high court ruled that the parties had clearly expressed their intent in the in vitro fertilization consent forms.[117] It reasoned:

> Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them. Indeed, parties should be encouraged in advance, before embarking on IVF [in vitro fertilization] and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of the IVF programs.[118]

Intention underlies the California Supreme Court's recent decision in an equitable-adoption case that "[t]he existence of a mutually affectionate relationship, without any direct expression by the decedent of an intent to adopt the child or to have him or her treated as a legally adopted child, sheds little light on the decedent's likely intent regarding distribution of property."[119] The court observed that a rule looking to the parties' relationship rather than to "particular expressions of intent to adopt, would necessarily be a vague and subjective one, inconsistently applied, in an area of law where 'consistent, bright-line rules' are greatly needed. Such a broad scope for equitable adoption would leave open to competing claims the estate of *any* foster parent or stepparent who treats a foster child or stepchild lovingly and on an equal basis with his or her natural or legally adopted children."[120] The court's rationale is not only applicable to intestate succession but also is arguably even more important in the court's determination of parentage for a minor when custody and affiliation are at stake.

A child's parentage should be determined based on facts that existed at the time of conception and established as soon as possible after the child is born, so that the child may be assured of care and support and so that the parents may have "some measure of confidence in the legal ramifications of their procreative actions."[121] California's statutory system provides a variety of means of announcing or determining parental intent, such as by birth certificates, declarations of parentage, and adoption decrees. Likewise, the legal system provides a variety of deadlines intended to secure parentage at the earliest time, such as the deadline on blood tests to determine paternity[122] and the requirement that a presumed father take prompt steps to establish his parentage or lose it.[123]

It stands to reason that a person who intends to become a parent will more willingly and consistently undertake the very real burdens of parenthood than one who becomes a parent involuntarily. One who has not undertaken any of the legal burdens of parenthood from the outset can easily walk away from responsibilities of caretaking and/or support if those responsibilities no longer suit that person's objectives.

By contrast, it would be destabilizing for both child and parent if parentage could be redetermined

over time, based on changes in domestic partners' relationships to each other or to the children, changes in domestic partners' intentions, or parents' changing partners. Each of the three pending cases arose because one partner changed her position on parentage from that which she held at the time the child was born. If best interest were to govern parentage decisions, there would be absolutely no certainty that a child would have the same parents over his or her lifetime. Former partners could change their minds about parentage without adverse consequences—contrary to existing legal doctrines that prohibit a person from changing his or her position when others have relied on it to their detriment. Parentage actions could be initiated by subsequent partners throughout a child's minority. Litigation would proliferate and settlements would not be fostered by use of the best-interest test. Litigation itself is a profoundly destabilizing element for the children as well as the adults involved. By contrast, giving effect to expressed intention in the three pending cases will help prevent future litigation over parentage. The absence, until recently, of clear legal standards for determining parentage in same-sex couples has provoked litigation that could have been avoided had a clear standard been in place.

The intention test avoids litigation by defeating a change of course based on one party's change of heart. Where intentions are set out in advance and enforced by restrictions on later claims based on a change of mind or heart, stability and constancy are promoted. The Supreme Court in *Johnson* and the Court of Appeal in *K.M. v. E.G.* observed that application of the best-interest test would foster litigation and promote instability in the children's lives.[124]

In contrast to the best-interest test, the intention test is objective, gender-neutral, and consistent. The intention test rests on judicial assessment of the parties' expressed intent, rather than on judicial assessment of what would most benefit the children involved. The best-interest test has historically resulted in shifting and inconsistent decisions based on shifting notions of parental roles, stereotypes, and biases.

The intention test allows same-sex parents, such as those involved in the three pending cases, to articulate parentage just as opposite-sex parents have been permitted to do. Indeed, the intention test harmonizes the three pending cases.

In *Elisa Maria B. v. Superior Court,* the parties evidenced their intent to co-parent by their expressions to themselves and to the world that they were both parents, from their children's birth certificates, and from their course of conduct after the children were born. In *Kristine Renee H. v. Lisa Ann R.,* the parties made their intent clear by obtaining a judgment based on their stipulation that they would both parent the child whom Kristine Renee H. was then carrying. In *K.M. v. E.G.,* it is likewise clear, both from the ovum-donor consent forms and from the parties' prior oral agreements, that the parties intended that E.G. be the sole parent. Application of the intention test provides consistency among these three cases and the assisted reproductive technology cases that have preceded them.

In contrast to biology, intention as the criterion leads to rational outcomes in reproductive technology cases. Prospective parents may choose to use the genetic material of someone to whom they are already related, such as a parent or sibling. If, for example, E.G. had used the ova from a sister instead of K.M.'s ova, the children would still be E.G.'s children under the intention test. But if this court were to use biology as the test, would the ovum donor be the children's aunt or their mother? The question becomes the more perplexing for a woman who uses, for example, a sperm donation from her father or an ovum donation from her mother. Biology does not provide a rational solution to the parentage issue in such cases, whereas intention does.

The decision whether to become a parent is an inherently private matter, long protected by both the U.S. and California Constitutions. A state's statute proscribing the distribution of contraceptives to prevent pregnancy, for example, gave rise to a resounding pronouncement in favor of individual autonomy: "If the right of privacy means anything, it is the right of the *individual,* married or single, to

be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[125] This right of privacy extends to the decision, subject to certain limitations, to end an unwanted pregnancy.[126] The right of privacy regarding procreative decision making was explicitly recognized by the California Supreme Court in *Johnson v. Calvert.*[127]

Such privacy rights are protected and served by a test that allows individuals to decide at the outset whether to become a sole parent or to take on a second parent. The intention test enables domestic partners to decide for themselves whether or not to become joint parents through adoption, through registration as domestic partners prior to birth, through a stipulated judgment of parentage, or by other clear expressions of their intent. The intention test enables a person to become a sole parent by adoption or by using a sperm donor, an ovum donor, or a combination of both, as did E.G. It likewise enables persons to become joint parents through the use of the same technology; the outcome is dictated by choice and clear expression of intention.

The autonomy afforded a person or a couple under the intention test would succumb to substantial uncertainty if the best-interest test, statutory presumptions, or biology were to be adopted as modes for determining parentage.

## CONCLUSION

Contrary to the perceptions of some, the intention test is not unfriendly to same-sex partners. To the contrary, it fosters privacy, choice, and autonomy for same-sex partners. "To be or not to be"[128] a parent is a very real choice for same-sex couples, who principally rely on assisted reproductive technology to become parents. Whatever choice they elect at the outset should be binding upon them, whether only one of them is the parent or they are co-parents. Adoption of the best-interest test would impose unwilling parenthood on some persons who intended to be helpful partners but not parents or unwilling co-parenthood on some persons who intended to be sole parents. The intention test promotes stability and certainty for the children of same-sex couples through the early and final determination of parentage. And the intention test provides equal rights and responsibilities for same-sex and opposite-sex couples and ensures consistent application of the law.

## *AFTERWORD*

The California Supreme Court issued decisions in the three cases on August 22, 2005, after this article was written but prior to its publication. In *Kristine H. v. Lisa R.,* the court ruled unanimously that Kristine was barred by the rule of judicial estoppel from denying the parentage of her partner because she had filed the petition for a declaration of parentage jointly with Lisa and had stipulated to the issuance of a judgment that both she and Lisa were "the joint intended legal parents" of her unborn child.[129] The court declined to rule on the validity of the stipulated judgment itself, thus leaving open that question.[130] This ruling thus provides little guidance for other couples who may have used or may want to use this procedure for establishing parentage. While the ruling may deter some parties from challenging the validity of such judgments in the future, it may also render it less likely that trial courts will render such judgments or that other states will enforce them when the parties relocate.

In *Elisa B. v. Superior Court,* the court ruled that a woman who agreed to rear children with her lesbian partner, supported her partner's use of an anonymous sperm donor, and received the children born of that procedure into her home and held them out as her own is the children's parent under the UPA and has an obligation to support those children.[131] The court found that the statutory presumption of paternity from California Family Code section 7611(d) applies to a woman who, though not biologically related to a child, receives that child into her home and holds out the child as her own.[132] It further held that both parents of a child can be women, distinguishing this case from the facts in the court's prior decision in *Johnson v. Calvert.*[133] And the decision cites

with approval the legislative preference for a child to have two parents for financial support.[134] The court disapproved the earlier Court of Appeal rulings in *Curiale v. Reagan,*[135] *Nancy S. v. Michele G.,*[136] and *West v. Superior Court*[137] (all of which had disallowed parentage claims by a birth parent's lesbian partner) to the extent they were inconsistent with its decision.[138] Of the three decisions, this one is likely to have the greatest applicability to other couples in the future, because it applies the UPA presumption for couples who did not adopt or otherwise formalize their relationship. There is no reason it should not apply as well to gay men as co-parents.

In a decision with two forceful dissents, the court decided in *K.M. v. E.G.* that when a woman provides her ova to her lesbian partner in order to produce children who will be raised in their joint home, both the ovum donor and the woman who bears the children are the children's parents.[139] Because these facts may be relatively rare, the case may or may not have limited applicability. But it is of great concern nevertheless, because the holding authorizes disparate treatment of ovum and sperm donors. The court specifically held that Family Code section 7613(b), which provides that a man is not a father when he provides semen to a physician to inseminate a woman who is not his wife, does not apply to a woman who provides her ova to a physician to impregnate a woman under the circumstances of this case.[140] The decision disregarded the parties' express prebirth intentions and the express written waiver of parentage by the ovum donor.[141] The majority stated that determining the parties' intent was unnecessary in a case where the parties' claims of parentage were not mutually exclusive, as in *Johnson v. Calvert;*[142] because one woman bore the children and the other provided the ova, they were both parents under the UPA, and there was no tie to break as there would have been if a third party had also asserted parentage.[143] And it also stated that "it would be unwise to expand the application of the intent test . . . beyond the circumstances presented in *Johnson.*"[144] Justice Werdegar's dissent decries the majority's ruling and abandonment of the intent test, stating that the majority's new rule "inappropriately confers rights and imposes disabilities on persons because of their sexual orientation."[145] She is concerned that the majority's rule "may well violate equal protection."[146]

In all three cases, the Supreme Court ruled that both members of the couple were the parents of the children. Although by different reasoning in each case, the court did in fact render it easier for same-sex parents to be recognized as joint parents.

NOTES

1. West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997); Cal. Fam. Code §§ 7600–7730 (West 2005).

2. Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

3. Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); *West,* 69 Cal. Rptr. 2d at 160.

4. *Nancy S.,* 279 Cal. Rptr. at 216–17.

5. Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

6. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {___}, *available at* www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-250/ab_205_bill_20030922_chaptered.pdf (codified at Cal. Fam. Code §§ 297–297.5 (West 2005)).

7. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004); Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004), *review granted sub nom.* Elisa B. v. Superior Court, 97 P.3d 72 (Cal. 2004); K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

8. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (finding that California law recognizes only one mother for any child).

9. *Id.*

10. *Id.* at 783 (quoting Marjorie McGuire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,* 1990 Wis. L. Rev. 297, 323 (1990)).

11. *Id.* at 778.

12. *Id.*

NOTES

13. *Id.*

14. *Id.*

15 *Id.* at 779, 781.

16. *Id.* at 782.

17. *Id.* at 781.

18. *Id.* The presumption urged by some of the parties in the current cases is that a man who accepts a child into his household and holds the child out to the world as his own is presumed to be the father of the child. Cal. Fam. Code § 7611(d) (West 2005). That presumption has been extended to the mother and child relationship. *Id.* § 7650.

19. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

20. *Id.*

21. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004).

22. *Id.* at 127.

23. *Id.*

24. *Id.* at 128.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 129.

31. *Id.*

32. *Id.* at 134, 143–46.

33. *Id.* at 142–43.

34. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 139 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

35. *Id.* at 140.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. K.M. v. E.G., 33 Cal. Rptr. 3d 61, 65 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S125643.PDF.

41. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 140–41 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

42. *Id.* at 141.

43. *Id.*

44. *Id.*

45. *Id.* at 140.

46. *Id.* at 141.

47. *Id.*

48. *Id.*

49. *Id.* at 141–42.

50. *Id.* at 143.

51. *Id.* at 143–44.

52. Cal. Fam. Code § 7650 (West 2005).

53. *K.M.,* 13 Cal. Rptr. 3d at 151.

54. Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004), *review granted sub nom.* Elisa B. v. Superior Court, 97 P.3d 72 (Cal. 2004).

55. *Id.* at 497–98.

56. *Id.* at 498.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 499, 501–04.

66. Cal. Fam. Code § 7610 (West 2005).

67. *Id.* § 7541.

68. Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

NOTES

69. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004).

70. Cal. Fam. Code § 7540 (West 2005).

71. *Id.* § 7611(b).

72. *Id.* § 297.5(4).

73. *See* California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {___}, *available at* www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-250/ab_205_bill_20030922_chaptered.pdf (codified at Cal. Fam. Code §§ 297–297.5).

74. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

75. *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).

76. Cal. Fam. Code § 7611(d) (West 2005).

77. *Id.* § 7611(d).

78. Miller v. Miller, 74 Cal. Rptr. 2d 797 (Cal. Ct. App. 1998).

79. *Id.*

80. *In re Karen C.,* 124 Cal. Rptr. 2d at 677.

81. Cal. Fam. Code § 7613(b) (West 2005).

82. *Id.* §§ 7571, 17410–12.

83. Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004), *review granted sub nom.* Elisa B. v. Superior Court, 97 P.3d 72 (Cal. 2004).

84. *Id.* at 498.

85. *Id.*

86. *Id.* at 497.

87. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004).

88. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

89. K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

90. *Id.* at 151.

91. *Id.* at 141.

92. *Id.* at 151.

93. *Id.*

94. *Id.* at 153–54.

95. *Id.* at 154.

96. *Id.*

97. Troxel v. Granville, 530 U.S. 57, 64–65 (2000).

98. *Id.*

99. *See, e.g., In re* National Recreation Products, Inc., 403 F. Supp. 1399, 1404 (C.D. Cal. 1975) ("Where possible it is preferable to base a decision concerning a question of law on statutory construction [rather] than on constitutional issues").

100. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

101. Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction, and the New Reproductive Technologies,* 28 Ariz. St. L.J. 473, 494–95 n.95 (1996) (citing Painter v. Bannister, 140 N.W.2d 152, 155–56 (Iowa 1966)).

102. *Id.* at 494–95.

103. David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness,* 2 J. Center for Fam. Child. & Cts. 109, 120 (2000).

104. Cal. Fam. Code §§ 8600–22, 8800–23, 9000–07 (West 2005); Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

105. *Sharon S.,* 73 P.3d at 562.

106. Cal. Fam. Code §§ 7571, 17410–12.

107. *Id.* § 7613; People v. Sorensen, 437 P.2d 495 (Cal. 1968).

108. Dunkin v. Boskey, 98 Cal. Rptr. 2d 44 (Cal. Ct. App. 2000).

109. Cal. Fam. Code § 7611(d) (West 2005).

110. Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law,* 23 Vt. L. Rev. 225, 228–29 (1998).

111. *Id.* at 235.

112. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

113. *Id.* at 290.

114. McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

115. *Id.* at 480.

116. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

117. *Id.* at 178.

NOTES

118. *Id.* at 180 (citations omitted).

119. Estate of Ford, 8 Cal. Rptr. 3d 541, 548 (Cal. 2004).

120. *Id.* at 548 (citation omitted).

121. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 151 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

122. Cal. Fam. Code § 7541 (West 2005).

123. Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992).

124. Johnson v. Calvert, 851 P.2d 782–83 (Cal. 1993); *K.M.,* 13 Cal. Rptr. 3d at 153.

125. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

126. Roe v. Wade, 410 U.S. 113 (1973).

127. *Johnson,* 851 P.2d at 786–87.

128. William Shakespeare, Hamlet act 3, sc. 1 (Washington Square Press 1992) (1623).

129. Kristine H. v. Lisa R., 33 Cal. Rptr. 3d 81, 87–88 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S126945.PDF.

130. *Id.* at 87.

131. Elisa B. v. Superior Court, 33 Cal. Rptr. 3d 46, 57 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S125912.PDF.

132. *Id.* at 58.

133. *Id.* at 53.

134. *Id.* at 51.

135. Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

136. Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

137. West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997).

138. *Elisa B.,* 33 Cal. Rptr. 3d at 59.

139. K.M. v. E.G., 33 Cal. Rptr. 3d 61, 63 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S125643.PDF.

140. *Id.* The majority did, however, leave the door open for the application of California Family Code section 7613(b) to ovum donors under different circumstances, suggesting that this was a very narrow decision. *Id.* at 68.

141. *Id.* at 72.

142. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

143. *K.M.,* 33 Cal. Rptr. 3d at 71.

144. *Id.*

145. *Id.* at 78.

146. *Id.*